

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HONG VAN NGUYEN**  
Claimant

VS.

**IBP, INC.**  
Respondent  
Self-Insured

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Docket No. 176,235

**ORDER**

Claimant filed an application for review by the Appeals Board of the Award entered by Special Administrative Law Judge Michael T. Harris on July 29, 1996. Mr. Jeff Cooper was appointed Member Pro Tem for this case to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Claimant appeared by and through his attorney, Diane F. Barger of Wichita, Kansas. Respondent, a self-insured, appeared by and through its attorney, Tina M. Sabag of Dakota City, Nebraska. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Claimant requested Appeals Board review for the following issues:

- (1) Nature and extent of claimant's disability.

- (2) The amount of claimant's gross average weekly wage.

Before the Appeals Board, the respondent raised the following issues:

- (3) Whether claimant's written request for review by the Appeals Board was timely filed.
- (4) Whether the deposition testimony of James P. McHugh, Ph.D., should be considered part of the evidentiary record because the deposition was taken after claimant's terminal date had expired.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

The first issue the Appeals Board will address is whether claimant timely filed an application for review before the Appeals Board as this issue is dispositive of all issues in this matter. The evidentiary record shows the following facts relating to this issue:

- (1) The Special Administrative Law Judge entered his Award on July 29, 1996.
- (2) Claimant's application for review of the Award was received and filed of record with the Division of Workers Compensation on September 9, 1996.

The time interval in which a party must file a written request for Appeals Board review of a decision made by an administrative law judge is governed by K.S.A. 1996 Supp. 44-551(b)(1) which provides in pertinent part:

"All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . ."

As previously noted, Special Administrative Law Judge Michael T. Harris entered the Award in this matter, on July 29, 1996. The claimant filed his application for review on September 9, 1996, clearly in excess of the 10 days allowed by K.S.A. 1996 Supp. 44-551(b)(1).

After claimant filed his application for review, he filed before the Appeals Board on September 20, 1996, a sworn affidavit signed by Ellen Beeson-Crabtree, office manager/bookkeeper for claimant's attorney. Attached to the affidavit was a copy of an envelope from Kansas Department of Human Resources, Wichita, Kansas, and addressed to claimant's attorney in Emporia, Kansas. The envelope was stamped received on September 6, 1996. The envelope contained the correct address of claimant's attorney

except the zip code was incorrect. The zip code was a zip code designated for Topeka, Kansas, instead of Emporia Kansas. The affiant states that the envelope she opened on September 6, 1996, contained the Award in the case of Hong Van Nguyen v. IBP, Inc., Docket No. 176,235, dated July 29, 1996. The claimant argues that since he was not notified of the entry of the Award until September 6, 1996, as evidenced by the affidavit, that his application for review filed before the Appeals Board on September 9, 1996, was timely as it was within 10 days from the date he received the Award. Claimant claims a gross injustice would prevail in this case, if the Appeals Board does not find that claimant's application for review was timely filed.

The Appeals Board has visited this issue before in the cases of Still v. Huntington Park Amoco, Docket No. 205,358 (March 1996) and Gillespie v. Heinz Pet Products, Docket No. 208,360 (December 1996). In both of those cases, the party seeking review by the Appeals Board claimed the Administrative Law Judge Order was not received until the 10 day appeal time had expired. In Still, the claimant claimed that the Administrative Law Judge's Order was delivered to the wrong office in the same office building that claimant's attorney was located. In Gillespie, respondent claimed and it was clearly shown on the Administrative Law Judge's Order that respondent's attorney was located in Overland Park, Kansas, instead of at his correct location of Topeka, Kansas.

The Appeals Board found in those cases that some statutes that prescribe the time in which an appeal has to be filed, permit the extension of the appeal time upon a party showing excusable neglect based upon failure to learn of the entry of judgement. See K.S.A. 60-2103(a); Schroeder v. Urban, 242 Kan. 710, 750 P.2d 405 (1988). However, K.S.A. 1996 Supp. 44-551(b)(1), the statute which prescribes the time period to appeal a matter from the administrative law judge to the Appeals Board, does not contain such language that would give a court authority to extend the appeal time. Additionally, the Kansas Supreme Court has recently held that there is no statutory basis for applying the provisions of the Kansas Code of Civil procedure to workers compensation appeals. See Jones v. Continental Can Co., 260 Kan. 547, Syl. ¶ 2, 920 P.2d 939 (1996). The Appeals Board is mindful that the Court of Appeals held in McIntyre v. A.L. Abercrombie Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996) that K.S.A. 60-206(a) applied to the 10 day time limit for requesting Appeals Board review of an administrative law judge's decision as set forth in K.S.A. 44-551. The Court of Appeals applied K.S.A. 60-206(a) to the K.S.A. 44-551 10 day limit because K.S.A. 60-206(a) by its explicit terms is generally applicable to all statutory time limits. The Appeals Board acknowledges that subsection (b) of K.S.A. 60-206 allows a judge discretion to enlarge a period of time an act is required to be done "for cause shown." However, the Appeals Board finds subsection (b) does not apply to K.S.A. 1996 Supp. 44-551(b)(1) because this subsection does not contain the explicit language which makes it applicable to all statutory time limits. In an administrative proceeding, the time for taking an administrative appeal, as prescribed by statute, is jurisdictional, and a delay beyond the statutory time is fatal to an appeal. See State Bank Commissioner v. Emery, 19 Kan. App.2d 1063, Syl. ¶ 1, 880 P.2d 783 (1994). Accordingly, the Appeals Board finds

that since claimant's application for review was filed out of time, the Appeals Board does not have jurisdiction to review this Award.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board, that the application for review filed by the claimant on September 9, 1996, is out of time and should be, and is hereby, dismissed. The Award entered by Special Administrative Law Judge, Michael T. Harris dated July 29, 1996, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectively disagree with the majority's decision. Under K.S.A. 44-523, the Appeals Board is not bound by technical rules of procedure but is directed to give the parties reasonable opportunity to be heard. If this is not a situation where technical procedure rules circumvent justice, what is?

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Tina M. Sabag, Dakota City, NE  
Lawrence Greenbaum, Kansas City, KS  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director